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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BRUCE ALLEN GANT, Defendant and Appellant.	H022003 (Santa Clara County Super. Ct. Nos. 200663, 201558)

On the day set for defendant's probation revocation hearing, defendant's privately retained attorney filed a motion to withdraw as counsel and for the court to appoint other counsel for defendant.

The motion to withdraw argued that defendant "wishes to present an argument and defense" that counsel "can not in good faith present" and that "disagreement between Mr. Gant and m[e] has led to a breakdown in the attorney-client relationship." Counsel offered to provide a limited amount of detail in chambers, but that offer was declined and the motion was denied. The hearing went forward and, after the evidence was presented, the court found that defendant had violated probation by failing to report his current address or whereabouts, failing to report to probation office visits, failing to provide proof of current employment, and being an ex-felon in possession of a firearm. Defendant was sentenced to three years in prison.

The prosecution maintains the motion to withdraw both was untimely and lacked grounds, as there was no breakdown in communication or lack of ability to prepare that has characterized criminal cases in which such motions have been granted. Defendant argues that the right to conflict-free, retained counsel of defendant's choice is paramount, that he is entitled to automatic reversal for failure to grant the motion, and that he should have been appointed an attorney to replace his retained counsel. On the record before us, which discloses nothing more of the alleged conflict, or other reasons for permitting attorney withdrawal, we affirm the decision of the trial court.

FACTS

The salient facts have been stated. Defendant's counsel's written motion to withdraw presented the facts by declaration of counsel Trevor Barna, as follows: "In preparing for the formal hearing on the allegation of violating probation, I spoke with Mr. Gant regarding possible defenses, the burden of proof, the People's and the Court's settlement offers, and the likelihood of success should this case continue to hearing. Mr. Gant has refused to take heed of my counsel, and insists on presenting a defense I do not support, and can not in good faith argue before this Court. This acrimony has resulted in an impasse with regard to the preparation and possible presentation of a defense to the Court. Mr. Gant believes I should proceed one way, and I believe it should proceed another. The only conclusion that can be agreed upon is that I should no longer represent Mr. Gant. [¶] From experience, I am aware that the Court is often times concerned with privately retained defense counsel seeking to be relieved due to issues of money. I want to assure the Court the conflict which has arisen does not involve any payment to counsel. The issues which have caused the rift in this case will not be resolved. I spoke with Mr. Gant about the conflicts and problems which have arisen. Mr. Gant does not want me to continue representing him in this matter. [¶] I understand that this declaration may be light on information. However, I am bound by my duty to Mr. Gant not to reveal too much to the Court, especially since this Court will decide guilt

and sentence for Mr. Gant. I believe it inappropriate for me to continue representing Mr. Gant. The Public Defender previously represented Mr. Gant. I believe it is appropriate that the Public Defender be appointed to represent Mr. Gant."

The declaration was signed and submitted on August 7, 2000, the date of the hearing. The following interchange between counsel and the court then occurred :

"Mr. Barna: . . . At this time I move . . . to be relieved as Mr. Gant's counsel. If the court would like to go into this further I would request that it be done in camera or off the record, and we'll be able to approach the bench on this issue. . . .

"The Court: Well, I can't have it off the record.

"Mr. Barna: The reason, Your Honor, for the request off the record is due to the fact of my presenting certain information to the court, I think on the record, could prejudice Mr. Gant and could go to areas of attorney-client confidentiality.

"The Court: Is there going to be some challenge of the attorney-client relationship by Mr. Gant by waiving it?

"Mr. Barna: No, sir.

"The Court: Well, you kind of put me in a hard spot, Mr. Barna.

"Mr. Barna: I do, Your Honor.

"The Court: Whatever cause there is you're going to have to somehow put it out so the court can review it and the district attorney can answer it.

"Mr. Barna: Yes, sir. I do have papers which I believe outline briefly the issue for the court that if I were to go into it further it would prejudice Mr. Gant's case before this court, as this court is the arbiter of Mr. Gant's violation and the sentence in this case.

"Ms. Storton [The Prosecutor]: Your Honor, I have not seen any papers yet, although I will say that Mr. Barna did call me last week and told me of the issue, which of course we are opposed to any continuance. . . .

"The Court: I don't think he is asking for a continuance. He's just asking for the attorney of record to get out.

"Ms. Storton: The People are already viewing this as a request for a continuance . . . . [¶] . . . [¶]

"Mr. Barna: Frankly, Your Honor, we were trying to resolve it to, frankly, last week even. It was a matter that I had hoped that could be resolved, and at the last time could not be resolved. That we were still looking for a remedy of the situation . . . and . . . as of last week tried to offer alternative ways and could not come up [*sic*] [with] an arrangement. [¶] . . . [¶] . . . [¶] . . . [¶]

"The Court: Well, Mr. Barna, this is an age-old difficulty that often comes up between an attorney and his client when there is a defense that one party wants to present and the other doesn't or vice versa, and for whatever reasons the attorney is going to have to prevail as long as he continues to represent him.

"So, if Mr. Gant wishes to represent himself that's fine, but he's going to go forward today.

"Mr. Barna: My position on this case is that, Your Honor, the conflict arises between myself [*sic*] and Mr. Gant not because Mr. Gant wants another attorney. Mr. Gant was previously represented by the Public Defender's Office. This, as I stated, is not a retainer issue. . . .

"The Court: Wait, wait, wait.

"Are you a court-appointed attorney?

"Mr. Barna: No, sir. I am a privately retained counsel. [¶] . . . [¶] . . . [¶]

"The Court: When did you first appear as attorney of record? [¶] . . . [¶] . . . [¶]

"Mr. Barna: - - May of this year. [¶] . . . [¶] . . . [¶] . . . [¶] . . . [¶]

"The Court: What are the issues now that he disagrees with, the way you are presenting the case?

"Mr. Barna: Again, that I think is best done off the record. And I can't go into it, Your Honor, without prejudicing Mr. Gant's case for to do so before this court, who is [*sic*] has the final decision in Mr. Gant's - -

"The Court: Why didn't you do it last time . . . .

"Mr. Barna: We were trying to resolve the issues. It's not something that I have done lightly. It's not something that has been accomplished in the last month. It's something that has occurred, and we tried to remedy it up until the very last moment. . . .

"The Court: So this morning you discovered that?

"Mr. Barna: Clearly not. We discussed that with [opposing] counsel last week. Unfortunately, as the court is aware, there are filing times for notices of motions in this county. Unfortunately, nothing is in effect for the motion notice of withdrawal.

"The Court: You prepared it for today?

"Mr. Barna: I signed it today. It was prepared last week. As I called [opposing] counsel last week and tried to contact the counsel before that, and I actually contacted the clerk of this court last week as well, unfortunately, I'm aware that the court prefers to have papers files [*sic*], and because of the time requirement for filing the papers this could not have been done within the time allowed for this Rule of Court.

"The Court: Well, I am going to deny the request on two grounds at this time, Mr. Barna.

"First of all, it's untimely. The morning of the hearing is way too late. If the problem didn't become apparent until then or couldn't be solved until then, it's not that big.

"Secondly, I don't know what the problem is, and I'm trying to imagine what could be such a huge problem of a disagreement of factors and so forth that would be grounds for it, and I can't imagine it. There's no grounds to grant it. It's untimely. . . . [¶] . . . [¶] . . . [¶]

"Mr. Barna: Your Honor, Mr. Gant wishes to address the court on the issue. Will the court allow Mr. Gant to be heard?

"The Court: No. He is represented by counsel, and counsel has to speak for him in this proceeding." (Capitalization omitted.)

The court had originally appointed a deputy public defender as counsel for defendant, at arraignment for violating probation, on May 4, 2000. On May 24, 2000, the public defender was relieved as counsel and Mr. Barna substituted as retained counsel. On June 14, 2000, the court held a discussion to set a formal date for the probation-revocation hearing, which was set for July 10, 2000. The People's brief characterizes what occurred on July 10, 2000, as the hearing being continued at defendant's request. Defendant maintains that the continuance granted on July 10, 2000, was actually supported by an agreement with the district attorney, and was readily granted because the hearing would not fit on Judge Lee's calendar but was more appropriately scheduled for Judge Fox, who customarily heard such matters. This is borne out by the transcript, in which the court appears undecided about whether to continue the matter until the deputy district attorney spoke in support of the continuance.

The hearing had been continued, therefore, to August 7, 2000, at which time defendant's counsel made the motion to withdraw and for appointment of new counsel.

Because this case concerns the right to counsel at a probation revocation hearing, various facts in the probation reports and underlying offenses are not significant. Briefly, however, the probation report indicates defendant's home was searched while he was in jail serving a sentence for possession of drugs for sale and drug paraphernalia. In the search, various drugs, a methamphetamine laboratory, weapons, and large amounts of cash were found in the house, on which defendant had record title. His girlfriend was arrested. Upon defendant's release from jail, he was instructed to return to and clean up the house. The probation report describes the house as having "[s]tuff . . . piled 3 - 4 feet high everywhere" that made the "house uninhabitable." Instead, defendant avoided the home except as a mail drop. He gave addresses for motels and a friend's house. The probation officer claimed defendant moved from these addresses after a short amount of time and failed to provide a current address.

Defendant's girlfriend jumped bail and the probation report continues that "[i]t is believed by the local police agencies that the defendant is with his girlfriend and may be involved in continued drug activity." Defendant provided proof of only "minimal hours worked" and "no verifiable source of income."

At the hearing, the probation officer testified essentially to the same effect as the probation report, recounted above. Defendant and his witnesses testified that defendant was afraid to enter his house because he believed that police were trying to "set him up" by arresting him for anything found in the house if he were found there. These statements are consistent with those he had made to his probation officer, as recounted in the probation report. He and a friend, Kevin Terrell, testified that defendant stayed for periods with Terrell, working on plumbing jobs from Terrell's plumbing shop, and did not receive consistent payment because of lodging and food he received from Terrell. Similarly, defendant had worked for the motel where he once stayed.

Defendant's probation hearing on August 7, 2000, adduced these facts. This court has no information in the record or presented by any other means of what conflict defendant's counsel had with defendant concerning these factual or legal defenses.

DISCUSSION

A. *Standard of Review*

Defendant maintains this case is governed by the rules explained in *People v. Ortiz* (1990) 51 Cal.3d 975 (*Ortiz*) as recently reiterated and amplified in *People v. Lara* (2001) 86 Cal.App.4th 139 (*Lara*). In both cases, the distinction is drawn between defendant's motion to discharge *appointed* counsel (e.g., the public defender), under the standards in *People v. Marsden* (1970) 2 Cal.3d 118, and a motion to discharge *retained* counsel. This difference in standards extends to the standard of review.

As summarized in *Lara*, "[T]he trial court's denial of a defendant's *Marsden* motion [for discharge of appointed counsel] is reviewed pursuant to the deferential abuse of discretion standard. [Citations.] In contrast, reversal is automatic when a defendant

has been deprived of his right to discharge retained counsel and defend with counsel of his choice. (*People v. Ortiz, supra,* 51 Cal.3d at p. 988.)" (*Lara, supra,* 86 Cal.App.4th at p. 154.) This is because "[s]ubstitution of appointed counsel threatens to waste public resources by creating 'duplicative representation and repetitive investigation at taxpayer expense.' (*People v. Ortiz, supra,* 51 Cal.3d at p. 986.)" (*Lara, supra,* 86 Cal.App.4th at p. 151.) *Retained* counsel, on the other hand, partakes directly of the right to be represented by counsel of defendant's choice, without conflict, and without such considerations. (*Ibid*.)

Given the trial court's continuing discretion, the standard of review consists of this court passing on the trial court's determinations for abuse of discretion. This "discretion" is applied to a more stringent set of factors than in a *Marsden* motion and to a presumption that defendant has an "automatic" right to change counsel in the absence of such factors. These factors are, in the current case, primarily to determine whether substantial evidence in the record supports the court's implicit finding that the motion was "untimely and would result in a ' "disruption of the orderly processes of justice unreasonable under the circumstances of the particular case." ' " (*Lara, supra,* 86 Cal.App.4th at p. 151.)[1]

[1] Both appellant and respondent argue from cases that concern criminal trials (e.g., *Ortiz, supra,* 51 Cal.3d 975; *Lara, supra,* 86 Cal.App.4th 139) whether defendant had the right to discharge counsel. They do not argue from cases concerning exclusively probation or parole revocation. The right to counsel for a parole or probation revocation hearing may not, however, be precisely coincident with the Sixth Amendment right, for an "accused" to have counsel. (See *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 790; *People v. Vickers* (1972) 8 Cal.3d 451 [right to counsel in a probation revocation hearing stems from considerations of due process]; *People v. Coleman* (1975) 13 Cal.3d 867, 876, fn. 8 [" 'the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply' "].) There are cases, however, that have applied to probation revocation the same standards for discharging counsel and self-representation that would be applicable for trial counsel. (*People v. Turner* (1992) 7 Cal.App.4th 913; *People v. Hall* (1990) 218 Cal.App.3d 1102.) We assume without deciding that this standard is correct, because the parties both

B. ***The Trial Court Was Within Its Discretion in Denying the Untimely Motion for Withdrawal of Counsel and Appointment of New Counsel***

The case here for withdrawal of counsel is nearly invisible on the record. This court has no record of what precise conflict counsel had with defendant that motivated counsel to move to withdraw.

Basically, the record for the motion consists of the statements of counsel in his declaration. No *in camera* session was held to make a record of what differences motivated the motion, perhaps because the trial court justifiably believed counsel's statements that defendant was not actually offering to inform the court of the conflicts since the same court would also be sitting as judge of the facts at the probation revocation hearing.

In *People v. Brown* (1988) 203 Cal.App.3d 1335, the Court of Appeal upheld the trial court's denial of a motion to withdraw similarly brought on the first day set for trial. There, an *in camera* hearing was held. "At an *in camera* hearing, outside of the prosecutor's presence, defense counsel told the court that it had become clear the previous afternoon when meeting with defendant that substantial differences had arisen between them. He felt he now had an irreconcilable conflict in representing defendant. At the same in camera hearing defendant insisted he saw no alternative to testifying on his own behalf if he wished to be exonerated of the charges against him. Defense counsel stated he could not, however, in good conscience allow defendant to testify as he indicated he would, believing defendant's testimony would be perjured. Defense counsel told the court he had told defendant that if defendant testified as he proposed, he felt he (defense counsel) would be suborning perjury. Nevertheless defendant insisted upon testifying to certain things defense counsel did not believe to be the truth and told his

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assume the *Ortiz* and *Lara* standard applies and, in any event, defendant does not meet even this standard for reversal.

counsel he did not want him as his attorney. Counsel asked to be relieved as defendant's attorney. Defendant joined in the request, telling the court that if his attorney did not feel he could do a good job, defendant did not feel he could do a good job." (*Id*. at p. 1338, italics added.)

The record in the *Brown* case, in which denial of the motion was upheld, was much stronger for reversal than the scant record here. We have nothing even as solid as an issue of potential suborning of perjury in any record before us. Further, in *Brown*, counsel had become aware of the issue "the previous afternoon." (*People v. Brown, supra,* 203 Cal.App.3d at p. 1338.) Here, counsel admitted that he had called the deputy district attorney the prior week. Moreover, defense counsel here goes back and forth about how much he can present to the court, even *in camera*, given the court's role as arbiter of the facts.

The record then shows the following: (1) that the reason for withdrawal presented itself at least several days before the probation-revocation hearing, and, although counsel called the prosecutor the prior week and also allegedly called the court clerk, he failed to bring a motion until the morning of the hearing; (2) that no motion for a continuance was made, such that defendant here may have been left without any counsel if the motion to withdraw had been granted; (3) that the conflict was over apparently what defenses to present, rather than counsel having any conflicting obligations or knowledge of conflicting facts that made it impossible ethically to proceed; (4) that counsel appeared, on the one hand, to offer to inform the court in more detail of the conflict he had with defendant while, on the other hand, actually stating that disclosing any substance to the court would invade the attorney-client privilege and "to go into it further it would prejudice Mr. Gant's case before this court, as this court is the arbiter of Mr. Gant's violation and the sentence." No real description of the conflict was forthcoming. It vitiates any failure of the trial court to hold an in camera hearing.

Aside from this Hobson's choice presented to the trial court, no attempt is made to inform this court of the substance of the conflict.

This contrasts with the situations in *Lara* and *Ortiz*. In both cases, the trial court erroneously treated the motions to discharge retained counsel as a motion to discharge *appointed* counsel, but the facts concerning the motions were also greatly different than here. In *Ortiz*, counsel first moved to withdraw more than nine months before the eventual plea in the matter, after the jury in a first trial had been unable to come to a unanimous decision; defendant again had moved to dismiss counsel shortly thereafter. (*Ortiz, supra*, 51 Cal.3d at pp. 979-980.) There were also unrefuted claims in *Ortiz* that the defendant still owed counsel's fees and costs from the first trial, and defendant claimed he was unhappy with counsel's failure to return calls, counsel's investigation, counsel's distraction with concurrent representation of Richard Ramirez in the notorious "Nightstalker" trial, and a breakdown in communication. Five months later, and still four months before defendant pleaded guilty, both defendant and counsel moved again for counsel to be discharged, on similar grounds. (*Ibid*.) The contrast with the facts here could not be more stark. There was not in *Ortiz* the last-minute, substanceless request on the morning of the hearing, that was made here.

In *Lara*, defendant was facing a "third-strike" sentence of 25 years to life for a burglary, and had no contact with his counsel over the eight months counsel had been retained. On the morning of trial, defendant complained about the lack of contact and also complained that defense counsel had not yet interviewed the alleged victims and witnesses, who were traveling from out of state and whom the prosecution had promised to make available; counsel also disagreed whether to call an alleged accomplice as a witness. (*Lara, supra*, 86 Cal.App.4th at pp. 147-148.) Thus, although made at the last minute, the stakes and grounds involved in the motion were clear and on the record.

The court in *Lara*, in fact, reviewed the many cases where such a motion was denied as untimely, and distinguished the peculiar factors in its case. "While appellant's

motion was made on the scheduled first day of trial, there is no evidence to suggest that appellant raised such complaints in an effort to improperly delay the proceedings. The record strongly suggests that Mr. Roberts [defense counsel] had not consulted with appellant during the numerous continuances, and appellant was unaware of the nature of Mr. Robert's preparation until the moment the trial was finally set to begin. Appellant was faced with the start of a trial in which he faced a possible third strike sentence, and he was clearly upset that counsel did not seem prepared. Under the circumstances, appellant informed the court of his concerns at the first possible opportunity." (*Lara, supra*, 86 Cal.App.4th at pp. 162-163.)

In *People v. Lau* (1986) 177 Cal.App.3d 473, a motion to withdraw was denied. There, defendant's attorney did not even appear for the scheduled first day of trial, appeared the next day to explain he believed a negotiated plea disposition could be reached, and the attorney and defendant both testified that they differed as to whether defendant was guilty and should plead. The court found the attorney would not have been doing his job if he had not expressed his honest evaluation of the likelihood of prevailing. The court's denial of defendant's motion to discharge his retained counsel was upheld. The court found there were no legally sufficient reasons supporting the motion, particularly given the late date it was being made. (*Id*. at pp. 477-478.) The court in *Lau* noted defendant's request "was made literally the moment jury selection was to begin. . . . [T]he timeliness, or lack thereof, of the request properly concerned the court." (*Id*. at p. 479.)

Similarly, in *People v. Turner, supra*, 7 Cal.App.4th 913, the court analyzed a very similar situation to the instant case, as follows: "Here defendant sought to replace his attorney on the day of trial. This meant that the request could not be granted without causing a significant disruption, i.e., a continuance with the attendant further inconvenience to witnesses and other participants. The question then became whether such a disruption was reasonable under the circumstances. The trial court properly

weighed the considerations relevant to this issue. After allowing defendant to explain his dissatisfaction with Mr. Rorty, the court found no adequate basis for permitting the disruption of a continuance. Defendant was unable to offer any countervailing consideration, and in particular failed to present any coherent reason for doubting the competence, diligence, motivation, or commitment of his existing counsel. Indeed, the vagueness of his complaints supported the court's apparent finding that the motion was motivated not by any genuine dissatisfaction with counsel but by a desire to delay the trial." (*Id*. at p. 919, fns. omitted.)

We find this case to be certainly more within the ambit of *Lau* and *Turner* than within the facts of *Ortiz* or *Lara*. Under *Ortiz* and *Lara*, again, "the trial court retained *discretion* to deny such a motion if the discharge (1) would cause ' "significant prejudice" ' to the defendant, e.g., by forcing him to trial without adequate representation, or (2) was untimely and would result in a ' "disruption of the orderly processes of justice unreasonable under the circumstances of the particular case." ' (*People v. Ortiz*, *supra*, 51 Cal.3d at p. 982 . . . .)" (*Lara, supra*, 86 Cal.App.4th at p. 153.) Plainly, the motion here was "untimely." It would have caused such " ' "disruption," ' " if a continuance was granted. As no continuance was requested, permitting counsel to withdraw could have " ' "significantly prejudiced" ' " defendant by forcing him to proceed "without adequate representation." (*Ibid*.)

Counsel here did not have the disability of having been unable to communicate or prepare, as in *Lara*. Most important, there were virtually no countervailing considerations. The most crucial interchange in this case, perhaps, was the point at which the trial judge asked whether defendant planned to waive the attorney-client privilege sufficiently to inform the court of the conflict that had arisen. Upon being informed that he would not, the court indicated that the motion put him in a "hard spot." Counsel agreed without providing any further information to aid the court. Counsel and defendant could have attempted to make the motion before the presiding judge or other judge of the

court, if they were concerned about disclosure of theories or evidence. Instead, of course, they chose to make the motion before the court that would be hearing evidence at the very last moment.

The trial court was left with virtually no grounds for determining that counsel should be replaced. This court has no more than the trial court before it on the appellate record. The trial court was justified in finding that the motion was untimely and without ascertainable grounds.

C. *The Court Did Not Err By Denying the Motion to Appoint Counsel*

Defendant separately argues that the trial court erred by failing to appoint counsel for him, which was requested as part of the motion to withdraw. Defendant argues, however, from the same cases, *Lara* and *Ortiz,* as setting the standards for appointing counsel, as were argued for permitting his counsel to withdraw. Since we have found under the standards in *Lara* and *Ortiz* that the motion to withdraw was not timely, the decision with regard to appointment of counsel follows from that. In other words, defendant was required to make a timely motion for discharging retained counsel—under the standards in *Lara* and *Ortiz*—as a prerequisite to appointment of counsel. If such a motion is not timely made, and is therefore denied because of untimeliness and disruption it causes, defendant still has counsel. The motion to appoint counsel to replace retained counsel is essentially moot or, in any event, denied on the same grounds.

Defendant argues that the trial court was incorrect in assuming that he must represent himself if his counsel was permitted to withdraw. He argues instead that the only constitutional alternative was appointment of counsel. Defendant contends: "Nowhere in the *Ortiz* opinion is self-representation mentioned as an acceptable option when retained counsel is discharged." In fact, the Supreme Court states in *Ortiz* that " 'significant prejudice' to the defendant" is a factor in denying a counsel's motion to withdraw. (*Ortiz, supra,* 51 Cal.3d at p. 983; *Lara, supra,* 86 Cal.App.4th at p. 153.) The most obvious meaning to this phrase is that defendant would suffer "prejudice" "by

forcing him to trial without adequate representation." (*Lara, supra,* 86 Cal.App.4th at p. 153.) This is how the court in *Lara* interprets the phrase in *Ortiz*, and we agree: *Ortiz* does indicate that a possible result of a last-minute motion of counsel to withdraw is that a defendant will have to continue without representation.

The trial court also noted, without contradiction from defendant, that no explicit motion was made for a continuance. A continuance would be necessary for appointment of counsel.

Even if a motion for a continuance was implied in the motion to appoint counsel, however, the motion papers stated under oath that payment of private counsel's retainer was not any part of the problem. As such, the motion to appoint counsel would have contemplated an instant appointment of counsel—or a continuance to appoint counsel—for an indigent, in a situation where defendant had funds for retained counsel that would be available to be applied to retention of new counsel.

Most importantly, however, as held in the prior section, the motion was untimely. It was made on the very morning of the hearing as it was scheduled to begin. The grounds for the motion, in an alleged conflict over what theories to present, had admittedly been present for at least a week, if not a good deal longer. Although defendant complains also that the court did not allow him personally to address the court, the trial court did say that counsel should "speak for him." There is no showing as to what defendant would have said that his counsel had not said, that would have affected the decision or excused the lateness of the motion. There remains no record of what conflict actually existed, if any, between retained counsel and defendant.

For all these reasons, we uphold the denial of the motion to appoint counsel as within the trial court's discretion.

D. ***Although Defendant is Entitled to Be Represented By Conflict-Free Counsel, the Record on Appeal Does Not Disclose A Conflict That Automatically Should Lead to Granting Withdrawal of Counsel in a Late-Filed Motion***

Defendant asserts he had a right to conflict-free counsel that should have resulted in the granting of his motion.

A criminal defendant's right to effective assistance of counsel, guaranteed by both the federal and state Constitutions, includes the right to representation free from conflicts of interest. To establish a violation of this right under the state Constitution, however, a defendant needs to demonstrate that an actual conflict of interest adversely affected his lawyer's performance. (*People v. Sanchez* (1995) 12 Cal.4th 1, 45; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1009.) The record should support an " 'informed speculation' " that counsel's representation was adversely affected by the claimed conflict of interest. (*Ibid*.)

As to what constitutes a conflict of interest, the Supreme Court said, in *People v. Jones* (1991) 53 Cal.3d 1115, "Conflicts of interest may arise in various factual settings. Broadly, they 'embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests.' " (*Id*. at p.1134, quoting *People v. Bonin* (1989) 47 Cal.3d 808, 835.)

On the record in this case, it is difficult to discern such a conflict. There is no indication, whatever, that counsel had responsibilities to another client, to a third person or to his own interests, that threatened his providing his best efforts on defendant's behalf. If there were such a showing, it may have justified granting of the motion, even though untimely, because of a demonstrated potential for prejudice that is simply lacking here.

Instead, the trial court was told, at most, that defendant "wishes to present an argument and defense" that counsel "can not in good faith present." This court has no

record of the defense over which counsel and defendant allegedly disagreed, and cannot know whether that defense was, after all, presented. Moreover, this is not a "conflict" of the same magnitude of loyalty to another client. Rather, for all that is shown, it was an argument over tactics. "An attorney representing a criminal defendant generally has the right to control trial tactics and strategy, despite differences of opinion or even open objections from the defendant." (*People v. Turner* (1992) 7 Cal.App.4th 1214, 1220.)

Even if the "conflict" involved suspected perjury, defense counsel had available means to relieve the conflict through having defendant present such testimony as a narrative. (See *People v. Guzman* (1988) 45 Cal.3d 915, 944-946 [overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069]; *People v. Johnson* (1998) 62 Cal.App.4th 608, 622-630.) The record here, however, lacked any showing that such conflict over perjury existed, even if it were implied in the supposed disagreement over tactics.[2]

This is not like the case of *Aceves v. Superior Court* (1996) 51 Cal.App.4th 584, 592, as contended by defendant, or even of *Uhl v. Municipal Court* (1974) 37 Cal.App.3d 526, 527-528 and *Leversen v. Superior Court* (1983) 34 Cal.3d 530, 539, upon which *Aceves* relies. All involved confidential communications that could not be divulged, but *some* information about the character of the communications indicated a conflict more meaningful than mere tactical disagreement. In *Aceves*, the

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[2] Even if perjury were the issue, as the court stated in *People v. Gadson* (1993) 19 Cal.App.4th 1700, 1710, footnote 5: "[P]ermitting defense counsel to withdraw does not necessarily resolve the problem. That approach could trigger an endless cycle of defense continuances and motions to withdraw as the accused informs each new attorney of the intent to testify falsely. Or the accused may be less candid with his new attorney by keeping his perjurious intent to himself, thereby facilitating the presentation of false testimony. Lastly, there is the unfortunate possibility that the accused may find an unethical attorney who would knowingly present and argue the false testimony. Thus, defense counsel's withdrawal from the case would not really solve the problem created by the anticipated perjury but, in fact, could create even more problems." (*Ibid*.)

court was told that the conflict involved " 'a statement no one can ignore' " by defendant, which caused an "absolute, irretrievable breakdown in the attorney-client relationship such that no member of the public defender's office could represent [defendant]." (*Aceves v. Superior Court, supra,* 51 Cal.App.4th at p. 589.) Such "meaningful information about the general nature of the conflict" (*id.* at p. 593) was not provided here. In *Uhl*, it was made clear that the conflict was with another existing client. (*Uhl v. Municipal Court, supra,* 37 Cal.App.3d at p. 528.) In *Leversen*, defense counsel's firm represented a rebuttal witness in another proceeding from whom it had confidential information. (*Leversen v. Superior Court, supra*, 34 Cal.3d at p. 538-539.) In contrast, the only nature of the conflict here, that is revealed, is the tactical disagreement.

A continuum clearly exists between these concepts of the timeliness of the motion, which is discussed above, and the strength of the record of a clear conflict. The "conflict" between defendant and his counsel here, over what defenses to present at the revocation hearing, may have been enough to require the motion to withdraw to be granted if it had been brought a week or several days before the hearing—since motions to discharge retained counsel should plainly be granted automatically if timely. As the time approaches the morning of the hearing, with witnesses ready to testify, however, such a "conflict" as alleged here—verging on a mere disagreement on tactics—was no longer sufficient to compel reversal of the decision of the trial court. The analysis is basically the same as under *People v. Brown, supra*, 203 Cal.App.3d 1335 and *People v. Lau, supra*, 177 Cal.App.3d 473, analyzed in Section B., above, that a motion to replace counsel that is delayed until the day of trial reduces the credence due to it and increases the factors weighing against it.

The lack of the record of any actual "conflict" here, along with the untimeliness of the motion, indicate that the trial court's discretion was properly exercised. Although defendant was entitled to representation that was free of conflicts, there is simply no

showing here of such a conflict as would require granting a motion to withdraw that was not made until the day of the revocation hearing.

DISPOSITION

The order and judgment appealed from are affirmed.

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RUSHING, J.

I CONCUR:

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BAMATTRE-MANOUKIAN, ACTING P.J.

I CONCUR IN THE JUDGMENT ONLY:

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MIHARA, J.